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9 Attorneys for BRIAN WAYNE WENDT

10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 vs.

17 JONATHAN JOSEPH NELSON, et al.,

18 Defendants.
19

Case No. CR-17-00533-EMC

**BRIAN WENDT'S STATUS
MEMORANDUM FOR MARCH 9, 2020
HEARING**

Date: March 9, 2020

Time: 10:30AM

Dept: The Honorable Edward M. Chen

20 BRIAN WENDT, through counsel, advises the Court of the following developments
21 since the last calling of the case on February 7, 2020:

22 I. Law Enforcement "Enterprise" Expert Disclosures

23 At the last calling of the case and at the request of Mr. Wendt, the Court directed the
24 government to identify the bases for each proffered opinion on an opinion-by-opinion basis for
25 both proposed government law enforcement experts (Austin and Scheetz). The Court did so in
26 order to develop the record in advance of the *Daubert* hearing scheduled to begin on April 1,
27 2020 and, specifically, to minimize the potential for (late) disclosure of methodologies or bases
28 during direct or cross examination of the proffered law enforcement experts. In this regard, both
the District Court and the Magistrate Court have, in the context of related litigation over the last

1 six months, articulated the need for expert disclosures consistent with Rule 16 and the Court's
2 duty to assess the reliability of each of the numerous and far-reaching proffered expert opinions.

3 A. The Government Has Not Fully Complied With this Court's Order to Disclose Bases and
4 Methodology on an Opinion-by-Opinion Basis.

5 On February 21, 2020, the government provided revised disclosure letters for both experts
6 which include footnotes following some but not all the opinions.¹ The footnotes appear to
7 reference bases for the opinions to which they are appended and appear to follow a formula
8 which, in many cases, begins with a carefully-worded but vague invocation to "experience
9 investigating the HAMC, conversations with undercover officers, informants, and current and
10 former members of the HAMC, and [the expert's] review of literature produced by and about the
11 HAMC."

12 Unfortunately, the cited invocation is too vague to assist the Court in its gate-keeping
13 function or the defense in its preparation for the *Daubert* hearing. In addition, many opinions
14 lack footnotes and, moreover, it is clear from the face of the footnotes that basic information is
15 lacking or is referenced in an extremely vague manner which does not convey useful information
16 to the Court or to the defense. For these reasons, Mr. Wendt submits that the footnotes do not
17 fully comply with this Court's Order and, therefore, as previously argued, this Court will be
18 asked, in the context of the *Daubert* hearing, to exclude opinions based on lack of disclosure in
19 addition to exclusion on other grounds.²

20 B. An Expert's Methods and Bases Must Be "Adequately Explained."

21 The inadequacy of the most recent "enterprise" expert disclosures can be understood by
22 reviewing the government's revised disclosures (attached hereto) and pertinent law. In this
23 regard, the Ninth Circuit has observed that: "As a prerequisite to making the Rule 702
24 determination that an expert's methods are reliable, the court must assure that the methods are

25
26 ¹ The disclosures included revised disclosures for both proposed witnesses and what appears to
27 be a revised CV for Brandon Austin.

28 ² Mr. Wendt is not re-renewing his request for further relief regarding inadequate disclosures. He
has previously litigated this issue before the District Court and the Magistrate Court. He notes,
again, the limitations of the government's disclosures but remains open to further disclosures
should the government reconsider its limited approach.

adequately explained.” *United States v. Hermanek*, 289 F. 3d 1076, 1093 (9th Cir., 2002) (reviewing testimony by a law enforcement officer whose expertise was largely proffered to explain certain drug commerce jargon to jurors and finding that some of the opinions stated had no identifiable reasoning, or methodology). It is significant that *Hermanek* involved far more modest aims for the testifying law enforcement expert than the broad aims reflected in the government’s disclosures in this case which seek to establish the fundamentals of the RICO conspiracy.

In this respect, the concerns reiterated for months by the Wendt defense (joined by other defenses) tracks the problem identified in *Claar v. Burlington Northern R.R.*, 29 F. 3d 499, 502 (9th Cir., 1994) regarding the lack of adequate explanation for proffered opinions. In *Claar*, the Circuit found that the District Court could not make findings required by F.R.E. 702 because the Rule 16 disclosures were “devoid of any such explanation” despite the fact that “The district court repeatedly ordered the experts to explain the reasoning and methods underlying their conclusions...”

Closer to home, Judge Orrick addressed this class of problematic conclusory opinions in his Order in *U.S. v. Williams*, Case No. 13-CR-00764-WHO (N.D. Cal., March 9, 2016), Doc 927, p. 10 where he explained that an officer’s referring to general investigations, conversations with other officers, conversations with alleged gang members, and local citizens were not sufficiently tied to an opinion rendered by an alleged “gang sign” to allow the Court to find the opinion both reliable and admissible.

Reviewing the litigation and disclosure process over the last six months, the “enterprise expert” disclosures have not added information about reasoning, methodology, and the reliability of the underlying opinions. As can easily be demonstrated by the discussion immediately below, the now partially footnoted disclosures do not indicate compliance with this Court’s directive that the government pay heed to Judge Alsup’s formula from the June 8, 2010, *Cerna* litigation Order. The inevitable result can be anticipated. The government will argue that it has gone “above and beyond” and that the matter should proceed to hearing. The Wendt defense will respond, as it had both in this Court and before Judge Beeler, that the upcoming 702 hearing will require the defense to focus first on whether there are bases for each opinions and then address the admissibility (including the reliability) of those opinions for which it appears that there is a adequately disclosed basis.

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2 C. Several Examples of the Footnoted Opinions Reflect the Lack of Disclosure.

3 For example, the government provides no basis for the following highly prejudicial opinions
4 regarding “vertical structure” and violent confrontations:

5 20a. HAMC charters have a vertical structure. Six members are required for the
6 charter to operate and remain functional. However, there have been exceptions to
7 this six full patch member rule in the past. All charters report to the higher levels
8 of the organization at the regional, national and world level. This formula is
9 present across the globe. Once they become an official charter, they receive a
10 certificate from the HAMC Corporation, and they agree to abide by the bylaws,
11 rules and regulations of the HAMC. [No Footnote]

12 35. The HAMC has also been involved in violent confrontations with the
13 Outlaws, Pagans, and Banditos OMGs over territory. [No Footnote]

14 Similarly, the following highly inflammatory opinions are supported by incomplete and
15 vague references which are, for the most part, unverifiable. Emphasis has been added to
16 highlight the vague nature of the information:

17 15. The **Filthy Few** tag means a member or prospect has committed an act of
18 violence in furtherance of the gang. If a prospect commits an act of violence, he
19 must wait until he receives his full patch. It can be rewarded for committing a
20 murder, assault or a beating. A member can wear the Filthy Few as a tag or side
21 rocker. It can also be displayed on indicia or the gas tank of a Filthy Few member.
22 The killing or violent act has to be witnessed by another member, and one can
23 only receive the tag from another Filthy Few member. If you are a member of the
24 Filthy Few, you can be called upon to commit additional violent acts, which is
25 depicted with “**666**” in the middle.⁷

26 ⁷The basis for Specialist Scheetz’s testimony includes his experience investigating
27 the HAMC, conversations *with undercover officers, informants, and current and*
28 *former members of the HAMC, and his review of literature* produced by and about
the HAMC. He has reviewed *internal HAMC documents* seized during
investigations in both the United States and Europe. For instance, he has reviewed
an expert report prepared by Jorge Gil –Blanco, produced at EXPERT-00000254
– EXPERT-00000318. This report contains a discussion of the Filthy Few tag at
EXPERT-00000281. Specialist Scheetz has also attended and monitored at least
150 events where Hells Angels were present. During some of those events, he has
personally observed members of the HAMC wearing the “Filthy Few” tag. In
addition, Specialist Scheetz has viewed photographs of members of the HAMC
wearing the “Filthy Few” tag. In addition, Specialist Scheetz was involved in ATF
Operation Black Diamond (*United States v. Rosga et al*, 10-CR-170 (EDVA)), in
which he debriefed *a source* and spoke to him/her about the meaning of the Filthy
Few tag. In addition, Specialist Scheetz has reviewed *press articles and books* that

1 describe the Filthy Few tag. One example of a book that describes the Filthy Few
2 Tag is Hell's Angels: Three Can Keep a Secret if Two Are Dead, by Yves
3 Lavigne.

4

5 20. **Charter.** The basic organizational unit of the HAMC is the charter, which is
6 operated out of a city or county. Each charter is self-sufficient in the sense that all
7 of its members have a say in the charter's decisions, internal disciplinary
8 measures against members, and other activities of the charter.¹²

9 ¹² The basis for Specialist Scheetz's testimony includes his *experience*
10 *investigating the HAMC, conversations with undercover officers, informants, and*
11 *current and former members of the HAMC, and his review of literature* produced
12 by and about the HAMC. For instance, Specialist Scheetz has reviewed internal
13 Hell's Angels documents, *such as* Hells Angels rulebooks (EXPERT-00000002–
14 EXPERT-00000149, EXPERT-000000222 – EXPERT-000000253, EXPERT-
15 0000364, EXPERT-00000365–EXPERT-00000395) and internal communications
16 (EXPERT-00000221). Information about the structure and autonomy of charters
17 can be found specifically (*among other places*) at EXPERT-00000370 and
18 EXPERT-00000375. In addition, Specialist Scheetz is also aware of *several*
19 *instances* in which charters have been strategically established in rival territory.
20 For example, the Hells Angels opened a charter in Michigan in 2020. Specialist
21 Sheetz is aware that Michigan has a significant Outlaws Motorcycle Club
22 presence.

23 These selected opinions illustrate the reasons for the Wendt team's concerns. The
24 government references second and third hand information made known to its proffered experts,
25 and their consideration of literature referenced in only general terms as well as the experts'
26 consideration of historical events as bases for the opinions. This information only gets us part
27 way to a recognizable disclosure, attentive to the requirements of an experience based opinion, as
28 discussed in the case law, and in the Advisory Committee Notes to the 2000 Amendment to Rule
702 which explains that: "If the witness is relying solely or primarily on experience, then the
witness must explain how that experience leads to the conclusion reached, why that experience is
a sufficient basis for the opinion, and how that experience is reliably applied to the facts." As the
Ninth Circuit pointed out in *Daubert II, Daubert v. Merrell Dow Pharma. Inc.*, 43 F. 3d 1311,
1319 (9th Cir., 1995) presenting an experts' qualifications and conclusions together with
assurances of reliability, "... that's not enough."

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2 II. Second and Third-wave Expert Disclosures

3 As the Court may recall, in August 2019 the defense and government agreed upon a
4 disclosure schedule which has not been met by the government.³ Since the last calling of the
5 case, the government has not provided further CAST or “third-wave” expert disclosures. Mr.
6 Wendt will therefore request hearing dates and mandatory disclosure dates sufficiently in
7 advance of those hearings.

8 III. Mr. Wendt Advises the Court that He Anticipates Substantial Litigation Not Related
9 to Expert Issues.

10 Mr. Wendt has focused on expert issues given the agreement reached with the government
11 and the theoretical ability of the parties and Court to address these issues now in order to avoid
12 substantial delays nearer to trial. Mr. Wendt also wishes to advise the Court that he anticipates
13 substantial litigation related to disclosure of overt acts not indirectly disclosed through the AEO
14 discovery and the related issues as well as a potential Bill of Particulars. He is researching these
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25 ³ As discussed in his January 13 Statement, in August, Mr. Wendt and the government agreed
26 upon a staged approach for the government’s three waves of experts. Mr. Wendt and the
27 government shared the express purpose of moving this case toward trial by “teeing up” issues
28 which could be litigated now to avoid future delays. To make this work, the parties agreed to a
timetable which is now substantially delayed. The timetable included full enterprise disclosure
by October 4, 2019, full CAST disclosures by October 4, 2019, and full disclosures for other
experts by January 10, 2020. Mr. Wendt regrets to inform that it appears that disclosures are not
complete for any of the phases and, in fact, that the third wave disclosures are, for all practical
purposes, non-existent.

1 issues and intends on initiating this litigation when he has completed necessary investigation. He
2 advises the Court to avoid the appearance that this case will only require work related to experts
3 in the near and medium-term future.
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5 Dated: March 6, 2020

Respectfully Submitted,

6 MARTIN ANTONIO SABELLI
7 JOHN T. PHILIPSBORN

8 /s/ John T. Philipsborn
9 JOHN T. PHILIPSBORN
10 Attorneys for Brian Wayne Wendt
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